

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY
BRANCH 4

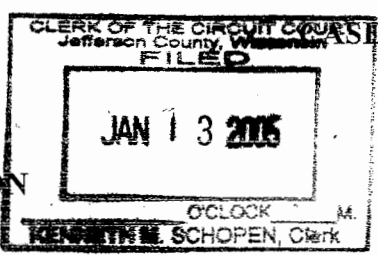
TOWN OF PALMYRA,
Petitioner,
and

DECISION

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STEWART CALKINS,
Petitioner,
vs.



CASE NO: 03CV400

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
Defendant.

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WISCONSIN PUBLIC SERVICE
COMMISSION

INTRODUCTION

Petitioners seek review of respondent Public Service Commission's ("PSC") Order Denying Petition to Open a Docket dated July 17, 2003. (R2) Respondent argues that its order is a nonreviewable, discretionary finding made under §66.0821(5), Stats., because it conducted an investigation as required by that section, concluded that a hearing was not necessary and never made a "determination", as that term is used in that section, which would trigger the petitioners' statutory right to judicial review. Alternatively, respondent argues that if judicial review is permissible, its order should be upheld pursuant to §227.57(8), Stats., because its exercise of discretion was within the range of discretion delegated to it by law and consistent with agency practice.

Petitioners' position is that because the Wisconsin Supreme Court in *Wisconsin's Environmental Decade, Inc., v. PSC*, 93 Wis.2d 650 at 655 (1980), characterized a decision of the PSC in that case to not investigate a complaint made against two utilities under §§196.28 and 196.29, Stats., as a nonreviewable, discretionary "determination," the PSC's denial of a petition

to open a docket in the instant case is also a “determination” as that term is used in §66.0821(5)(b), Stats.

Respondent characterizes *Wisconsin’s Environmental Decade* as supporting its position that an administrative denial of a petition to open a docket is, like a decision to not investigate a complaint against a utility, discretionary and nonreviewable in the absence of a specific statutory right to judicial review. Respondent further asserts that “determination,” as used in §66.0821(5)(a), Stats., is something the PSC makes only after a hearing and that the PSC’s pre-hearing denial in this case is therefore not a “determination” and not subject to judicial review under §66.0821(5)(b), Stats. (Respondent’s brief, p.5)

APPLICABLE LAW

The right of judicial review is entirely statutory, and orders of administrative agencies are not reviewable unless made so by the statutes. *Id.*, at 657. Sec. 66.0821(5)(b), Stats., permits judicial review of a “determination” made by the PSC under §66.0821(5)(a), Stats.

If the court grants judicial review, it is required to uphold an agency’s discretionary determination unless it finds:

“...that the agency’s exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court or agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.”

§227.57(8), Stats.

DECISION

The court determines that petitioners are entitled to judicial review because respondent’s election to not conduct a hearing is a “determination” as that term is used in both §66.0821(5),

Stats., and *Wisconsin's Environmental Decade*. As petitioners point out, §66.0821(5)(b) does not, by its terms, limit judicial review to post-hearing determinations. Rather, it applies, without any stated limitation, to determinations made under paragraph (a). This necessarily includes discretionary determinations both as to whether to conduct a hearing and as to whether, following a hearing, the complained of rates, rules or practices are unreasonable or unjustly discriminatory, because paragraph (a) specifically authorizes the PSC to make these two types of determinations.

Petitioners urge the court to remand the case to the PSC with an order "to conduct a proper investigation and schedule a hearing under §66.0821(5)." (Petitioner's reply brief, p.6) Petitioners claim that they are not asking the court to substitute its judgment for that of the agency but, rather, requesting the court to remand the case for the PSC to make a decision. (Petitioners' reply brief, p.5) For the court to do so, however, it would have to conclude that the PSC's discretionary determination that sufficient cause did not exist to support the complaint was erroneous. Respondent correctly argues that remand is allowed only if the PSC erroneously exercised its discretion, as provided by §§227.57(2),(8), Stats.

Based upon a review of the record, the court cannot find that the PSC erroneously exercised its discretion: it considered all information supplied by both parties to the dispute (R4, 5, 7, 8, 9, 14, 15), and determined that there did not appear to be sufficient cause for the complaint. (R3) The Findings of Fact by the Village Board of Palmyra (R7), by itself, provides a substantial, reasonable basis for the PSC to reach the determination that it did. This court may well have reached a different conclusion than did the PSC, but the court is not allowed to substitute its judgment for that of the agency on a discretionary issue. §227.57(8), Stats.

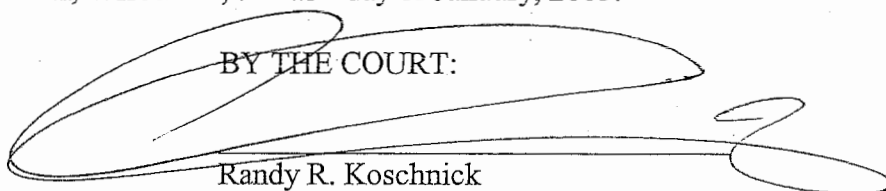
Petitioners also propose alternative remand theories under §§227.57(4) and (7), Stats., but remand under these subsections is not warranted because petitioners' arguments on these assertions are undeveloped and not supported by the record.

CONCLUSION

For the foregoing reasons, the court hereby upholds the PSC's Order Denying Petition to Open a Docket dated July 17, 2003. Counsel for respondent will prepare and submit an order consistent with the court's decision within ten days on a five day objection as to form basis.

Dated at Jefferson, Wisconsin, this 13th day of January, 2005.

BY THE COURT:



Randy R. Koschnick
Circuit Court Judge, Branch 4

CC: Attorney Russell W. Devitt
Attorney Jeffry J. Patzke

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

JEFFERSON COUNTY

TOWN OF PALMYRA

Petitioner,

and

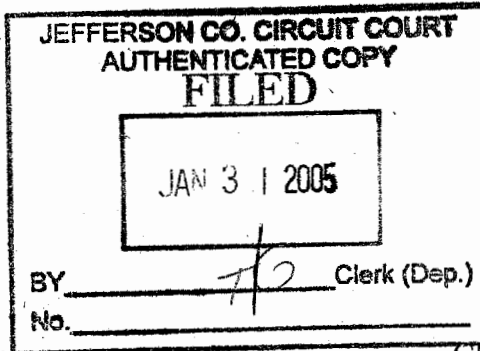
STEWART CALKINS,

Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.



Case No. 03-CV-0400

Classification Code: 30607

Administrative Agency Review

ORDER

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WISCONSIN PUBLIC SERVICE
COMMISSION

Based upon the parties' briefs and a review of the entire record, the Court finds the Public Service Commission of Wisconsin properly exercised its discretion, the reasoning as set forth in its January 13, 2005, Decision. Therefore, the Public Service Commission of Wisconsin's July 17, 2003, Order Denying Petition to Open a Docket is affirmed.

Dated at Jefferson, Wisconsin, this 3rd day of January, 2005

BY THE COURT:

151 Randy R Koschnick
Randy R. Koschnick
Circuit Court Judge, Branch 4

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